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August 28, 1998

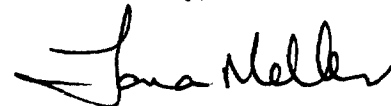
Mr. William F. Caton
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

**Re: Missouri Petition for Preemption of Section 392-410(7)
of the Revised Missouri Statutes of Missouri, CC Docket No. 98-122**

Dear Secretary Caton:

Enclosed are an original and twelve (12) copies of the Reply Comments of the American Public Power Association in the Petition referenced above. An additional copy is being delivered to Janice M. Myles of the FCC's Common Carrier Bureau and to the International Transcription Service, Inc.

Sincerely,



Lana Meller

cc: Counsel of Record

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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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AUG 28 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

The Missouri Municipal League;)
 The Missouri Association of Municipal Utilities;)
 City Utilities of Springfield;)
 City of Columbia Water & Light;)
 City of Sikeston Board of Utilities.)

CC Docket No. 98-122

Petition for Preemption of)
 Section 392.410(7) of the)
 Revised Statutes of Missouri)

To the Commission:

**REPLY COMMENTS OF THE
AMERICAN PUBLIC POWER ASSOCIATION
IN SUPPORT OF THE MISSOURI PETITION**

In its opening comments, the American Public Power Association ("APPA") endorsed the legal arguments presented by the Missouri Municipals and furnished additional support for their policy arguments. APPA now endorses the Missouri Municipals' Reply Comments and offers three additional reasons for rejecting the Incumbents'¹ opening comments: (1) several of the Incumbents' positions in this proceeding are inconsistent with points that the Commission has made itself in the City of Abilene's and APPA's appeal of the *Texas Order*; (2) the Incumbents' statements to investors, the media and the public not only contradict, but render absurd, their efforts in this proceeding to justify the Missouri legislature's enactment of HB 620; and (3)

¹ Like the Missouri Municipals, APPA will treat the Attorney General of Missouri, GTE Service Corporation, the National Telephone Cooperative Association ("NTCA") and Southwestern Bell Telephone Company collectively as "the Incumbents" unless the context warrants individual treatment.

Southwestern Bell is plainly incorrect in arguing that Congress intended to protect only the private sector from state and local barriers to entry.

I. THE COMMISSION'S STATEMENTS IN THE APPEAL OF THE TEXAS ORDER ARE INCONSISTENT WITH MANY OF THE OPPONENTS' POSITIONS HERE

A. The Legislative History Supports the Missouri Municipals' Position

1. The Commission Did Not Apply the Legislative History of Section 253 in Deciding the *Texas Order*

In its opening comments, NTCA concedes the relevance of the standard of statutory construction set forth in *Bell Atlantic Telephone Cos. v. Federal Communications Comm'n*, 131 F.3d 1044, 1047 (D.C. Cir. 1997), (citations omitted) which requires the Commission to "exhaust the 'traditional tools of statutory construction' to determine whether Congress has spoken to the precise question at issue . . . includ[ing] examination of the statute's text, legislative history, and structure, . . . as well as its purpose." NTCA's Comments at 4. NTCA asserts, however, that "[t]here is no evidence that the Commission failed to use 'traditional tools of statutory construction' in interpreting Section 253." *Id.* If Congress had intended the result that the Missouri Municipals seek in this proceeding, NTCA continues, "it would have 'expressly' discussed it somewhere in the legislative history." *Id.*

As the Missouri Municipals have pointed out in their Reply Comments, at 13-14, NCTA's argument that the Commission could reasonably require an "express statement" of legislative intent is contradicted by *Gregory v. Ashcroft*, 501 U.S. 452, 467 (1990). The Missouri Municipals also correctly observe that the Commission failed to analyze the language, structure or purposes of the Act, *id.* at 14. Now, the Commission has explicitly conceded the Missouri Municipals' point that the "FCC did not focus on legislative history when it ruled on Abilene's petition." *Commission's Brief* at 18, filed in *City of Abilene, et al. v. Federal Communications*

Comm'n, CA Nos. 1633 and 1634 (D.C. Cir.) (hereinafter "*Abilene* appeal") (Attachment A hereto).²

2. The Legislative History of Section 253 Includes the Work of the 103rd Congress

NTCA recognizes that the Missouri Municipals have presented a "very lengthy discussion of the legislative history of Section 253." NTCA's Comments at 5. NTCA insists, however, that "[t]he Missouri Municipals merely extract portions of the legislative history and subsequent letters and frame them in a manner supportive of their position," and "[a] careful reading indicates that the Missouri Municipals formulate conclusions with a specific intent in mind." *Id.* Notably, as the Missouri Municipals point out in their Reply Comments, at 14, NTCA does not explain its argument or present any concrete examples from the legislative history to support it.

For its part, Southwestern Bell at least offers a few citations to the legislative history, but it studiously avoids any discussion of the history of the 103rd Congress.³ This omission is especially revealing because, as a party to the *Abilene* appeal, Southwestern Bell knows very well

² According to the Commission, it did not analyze the legislative history because no party to the *Abilene* proceeding asked it to do so. Attachment A at 17-18. The Commission must have overlooked the comments of APPA, which did in fact do so. Attachment B hereto.

³ Southwestern Bell's citations make its erroneous arguments immediately apparent. For example, Southwestern Bell claims that the language of Section 253(a) indicates that Congress meant to go "no further" than "to end prohibitions on market entry by parties *subject to state regulation* – that is, to stop such practices as the granting of exclusive franchises to local telephone companies." Southwestern Bell's Comments at 8 (Southwestern Bell's emphasis). Inexplicably, Southwestern Bell relies on the following citations to support of this statement: "See, e.g., H.R. Rep. No. 104-204, pt. 1, at 48 (1995) ('Technological advances would be more rapid and services would be more widely available and at lower prices if telecommunications markets were competitive rather than regulated monopolies.');" S. Rep. No. 104-23, at 19 (1995) ('[T]he Committee recognizes that minimum requirements for interconnection are necessary for opening the local exchange market to competition.')." Southwestern Bell's Comments at 8 n.11. In any event, as the Missouri Municipals note, at 17-18, telecommunications services of public entities in Missouri are subject to regulation by the State's Public Service Commission.

that the Commission *twice* confirmed in its brief that events in the 103rd Congress are highly relevant to the legislative history of Section 253. Thus, at one point, the Commission notes that the “1994 Senate bill, whose preemption provision for removing entry barriers formed the basis for section 253, defined “telecommunications carrier” to include “an electric utility” that “provides telecommunications services.” *Commission's Brief* at 18 n.8, filed in *Abilene* appeal. Later, the Commission reiterates that “[petitioners] rely principally on a 1994 Senate report on S.1822, a bill whose provision for removing entry barriers formed the basis for section 253.” *Id.* at 19.

To be sure, the Commission cited these and numerous other provisions in the legislative history of both the 103rd and 104th Congresses, as well as the subsequent letters from Congressman Dan Schaefer and Senator Bob Kerrey to Chairman Reed Hundt, to show that the Congress meant to distinguish municipal electric utilities from municipalities that do not operate electric utilities. *Commission's Brief* at 18 and 18.n.8, 19 and 19 n.9, filed in *Abilene* appeal. APPA will return to that point momentarily. For present purposes, the unmistakably clear point is that the Commission considered the history of the 103rd Congress to be a crucial part of the legislative history of Section 253. Indeed, as the Missouri Municipals showed in their petition, at 11, it is probably the most important part, because Congress completed virtually all of the substantive work on what was to become Section 253(a) by the end of the 103rd Congress. That showing stands unchallenged in the record.

3. The Legislative History Confirms That Section 253(a) Applies To Both Municipalities and Municipal Electric Utilities

Turning to the supposed distinction between municipalities and municipal electric utilities, APPA and the Missouri Municipals agree with the Incumbents that the Commission not attempt to draw such a distinction. As the Incumbents correctly note, municipal electric utilities in Missouri have no greater authority than the municipalities of which they are a part, and they

typically operate as departments or offices of their local government. Southwestern Bell's Comments at 11-13; GTE's Comments at 6 n.5. The same is generally true in other states. The Incumbents argue that the Commission should conclude from this that Congress intended to exclude even municipal electric utilities from the protections afforded by Section 253(a). In fact, the reverse is true.

For all of the reasons discussed in the Missouri Petition and APPA's opening comments, APPA believes that Congress intended Section 253(a) to protect not only municipal electric utilities but also municipalities that do not operate municipal electric utilities from state and local barriers to entry. At the very least, as the Commission has recognized, the legislative history is replete with evidence that Congress intended Section 253(a) to apply to municipal electric utilities. To effectuate that goal, Congress must have intended that the term "any entity" cover municipalities, as such. Any other conclusion would lead to absurd and unthinkable consequences for the future of the both the telecommunications and the electric power industries.

B. Subsequent Commission Statements Are Relevant to This Proceeding

Another striking omission from the Incumbents' comments is any meaningful response to the Missouri Municipals' extensive discussion of the Commission's numerous reports, decisions and orders that issued since the *Texas Order* was decided. Southwestern Bell, GTE and the Attorney General of Missouri do not address these statements at all. NTCA does so only in the most cursory and conclusory manner. NTCA's Comments at 5.

In the *Abilene* proceeding, the Commission has taken the position that the Court of Appeals cannot take its subsequent holdings into account in reviewing the *Texas Order* because, "[a]fter all, 'the Commission [can] hardly be faulted for ignoring "precedents" that did not precede.'" *Commission's Brief* at 23-24, filed in *Abilene* appeal (citations omitted). Rather, the Commission contends, "[i]f there is an inconsistency between the [*Texas*] *Order* and later FCC

decisions, 'it would appear more appropriate for the parties to these later cases to contest the inconsistency, than for [petitioners] to base [their] claim to inconsistency on subsequent opinions.'" *Id.*, quoting *AMR Family Broadcasting Group v. FCC*, 918 F.2d 960, 962 (D.C. Cir. 1990). For the reasons that APPA has offered to the Court of Appeals, APPA believes that the Commission's subsequent decisions are relevant even in the *Abilene/APPA* proceeding. At the very least, however, they are both relevant here and effectively uncontested by the Incumbents.

II. THE INCUMBENTS' PUBLIC STATEMENTS CONTRADICT THEIR POLICY ARGUMENTS IN SUPPORT OF HB 620

The Incumbents claim that the Missouri legislature acted reasonably in enacting HB 620 to avert cataclysmic consequences for the private sector in Missouri. For example, according to GTE, municipalities have such "raw power" over private industry – including "instant name recognition," "brand loyalty," and the "strong sense of civic pride and recognition that [exists] in every community" – that even GTE and Southwestern Bell must fear that municipalities such as Springfield, Columbia and Sikeston will drive private investors out of Missouri and replace Southwestern Bell's and GTE's monopolies with their own. GTE's Comments at 8-12. APPA seconds the Missouri Municipals' responses to these nonsensical claims. Furthermore, APPA offers Southwestern Bell's and GTE's own public statements to discredit these claims.

For example, on July 20, 1998, GTE announced its "12th consecutive quarter of double-digit core [earnings per share] growth and fourth consecutive quarter of double-digit consolidated revenue growth." Attachment C hereto at 1. For the quarter, consolidated revenues grew to \$6.28 billion and domestic access lines grew by 8 percent. *Id.* "With revenues of more than \$23 billion in 1997, GTE is one of the world's largest telecommunications companies." *Id.* at 4.

In the United States, GTE provided local telecommunications service in 28 states and wireless services in 17 states in 1997. *Id.* Only a few of these states had barriers to municipal

telecommunications activities such as HB 620.⁴ How could GTE have survived? According to Chairman and CEO Charles Lee,

GTE is one of the best-positioned companies in our industry today, especially as competition intensifies and customers seek bundled telecommunications products and services all on one bill. We are capitalizing on our inherent strengths, including a national footprint and one of the industry's broadest set of service offerings. The suburban and rural composition of many of our markets continues to fuel GTE's industry-leading growth in access lines and minutes of use. These markets also attract less competition due to lower density of customers per square mile, which reduces the cream-skimming opportunities for competitors. Since the Telecommunications Act was passed in February 1996, GTE has lost only 50,000 lines to resale by other companies.

Attachment C at 2-3. Nor has private investment capital dried up for GTE, even though it operated in numerous states that do not have barriers to entry. To the contrary, on July 28, 1998, GTE announced a merger with Bell Atlantic, creating a giant telecommunications provider with combined revenues of \$53 billion. This merger, Bell Atlantic CEO Ivan Seidenberg explained, means "more choice" and "more competition."

The combined enterprise will have the financial, operational and technological resources to compete effectively against the strategies of AT&T/TCI, SBC/Ameritech, WorldCom/MCI and others, both current and future.

Attachment D at 2-3. Charles Lee added,

We will be the only telecommunications company that has it all: a unique mix of local and long distance, national assets, and voice, wireless, data, Internet and other services. With those competitive advantages – by any existing or proposed

⁴ Other than Missouri and Texas, states that have statutory barriers to municipal entry include Minnesota, Minn. Stat. Ann. § 237.19 (requires 65% super-majority vote); Nevada, 1997 Nev. Stat. 268.086 (prohibits cities with populations of 25,000 or more from selling telecommunications services); Tennessee, Tenn. Code. Ann. § 7-52-406 (1997) (prohibits entities of local government from providing cable service, paging service, security service and internet service); Arkansas Telecommunications Regulatory Reform Act of 1997, § 9(b) (prohibits municipalities from providing local exchange service); and Virginia § 15.2-1500 Vir. Code (except for the Town of Abingdon, the home of a prominent Congressman, local governments cannot lease or sell telecommunications services, equipment or infrastructure, but local governments can sell their physical infrastructure that is in existence and in place by September 1, 1998).

communications company – we will be well-positioned to better serve our customers, accelerate our growth and continue to build shareholder value.

Id. at 3. If Bell Atlantic/GTE “has it all,” including the resources to “compete effectively” with the largest telecommunications companies in the world, why is it telling the Commission that it is terrified of being driven out of business by Springfield, Columbia and Sikeston?

According to its own public reports, Southwestern Bell has been doing just as well, if not better. On July 16, 1998, its parent company, SBC Communications, announced a whopping increase of 19.6 percent in quarterly earnings, to \$966 million, with revenues increasing 7.9 percent to \$6.6 billion for the quarter. Attachment E at 1. According to Chairman and CEO Edward Whitacre Jr.,

We remain on target to achieve all of the synergies associated with the Pacific Telesis merger, particularly revenue growth at Pacific Bell which increased 6.3 percent, driven in large part by our ability to sell vertical services as we continue to share expertise from Southwestern Bell.

...

We reached a number of key milestones across our businesses this quarter that are helping us maintain the momentum we’ve been building. We’re experiencing the benefit of being in great markets with strong potential, offering new products and services our customers want and having people who know how to execute.

Id. at 1, 2. On May 11, 1998, SBC had announced a \$62 billion mega-merger with Ameritech.

CEO Whitacre proclaimed,

This merger is critical because it transforms us into a company that has the size, scope and incentive to make the promise of the [Telecommunications] Act a reality. This new company will be in the best position to serve our customers in the evolving marketplace. We expect to see, in the next few years, the emergence of integrated national and international operators. Successful carriers will either be part of this group or more narrowly focused niche players. Our combined company intends to be one of the successful global players.

This merger should be viewed as a welcomed development by regulators. If they are looking for a truly potent way to jump start competition, then approving this merger should be a clear decision.

We are going to take advantage of the best employee team, the best customer service, and the best technology around.

Attachment F at 2. Wall Street and SBC's investors would surely be surprised to hear that Southwestern Bell believes that it lacks the size, scope or ability to stay in business in Springfield, Columbia and Sikeston.

In short, the Incumbents' comments are disingenuous and silly. The Commission should either reject them in this proceeding, or take their claims in this proceeding at face value and deny the proposed mergers.

III. CONGRESS DID NOT INTEND SECTION 253(a) TO PROTECT ONLY THE PRIVATE SECTOR FROM BARRIERS TO ENTRY

As discussed above, at 3, Southwestern Bell completely ignores the history of the 103rd Congress. Rather, Southwestern Bell attempts to resurrect an argument that it originally raised in the ICG and Abilene proceedings – that the legislative history proves that Congress intended Section 253(a) to protect only private entities from state and local barriers to entry. In response, APPA showed that Southwestern Bell's argument was untenable, (*See*, Attachment B at 2-5), and the Commission declined to embrace it in the *Texas Order*. The argument should fare no better in this case.

Southwestern Bell bases its argument primarily on the opening sentence of the Conference Report for the Telecommunications Act. According to Southwestern Bell, “[t]he Report explains that the legislation was intended ‘to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly *private sector deployment* of advanced telecommunications and information technologies and services to all telecommunications markets to competition.’” Southwestern Bell's Comments at 7, quoting S. Conf. Rep. No. 104-230, 104th Cong. 2d Sess. 1 (1966) (Southwestern Bell's emphasis).

At the outset, Southwestern Bell's argument is undercut by the Act itself. Congress used the words "rapid deployment" in the preamble to the Act, but it conspicuously omitted any reference to the "private sector." Rather, Congress states that the purpose of the Act is "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."

Second, the sentence from the Conference Report that Southwestern Bell quotes does not stop at the point at which Southwestern Bell inserts a period but it goes on to add "and for other purposes." This is significant. It is one thing to say that rapid private sector deployment is *one* of the goals of the Act and it is quite another to say that it is the *only* goal. As Congress knew, the private sector alone cannot deploy advanced telecommunications technologies and services everywhere at the same time, much less can it do so in a way that would "secure lower prices and higher quality services" for all American consumers. Moreover, Congress was fully aware that the private, for-profit sector has a history of limiting the services it provides to inner-city and rural areas. In fact, Southwestern Bell has recently confirmed this when it said that it would be interested in serving those areas only "if there is a proper balance of incentives, risk and possible reward." See *Petition of Southwestern Bell Tel. Co., et al.*, CC Docket No. 98-91, dated June 9, 1998 at 34-35. By including the term "and for other purposes" in its reports, Congress indicated that it was unwilling to stake the Nation's future in telecommunications solely on the private sector.

Third, as the Missouri Municipals noted in their Petition, at 2, telecommunications are becoming increasingly important to electric utilities' core business of providing efficient and reliable electric power. No one has questioned that the Telecommunications Act of 1996 permits investor-owned electric utilities to provide telecommunications services and facilities. In fact,

investor-owned electric utilities are actively engaged in expanding into the telecommunications marketplace. If the Commission expressly or effectively denied publicly-owned electric utilities an equal opportunity to upgrade and use their telecommunications infrastructure to maximum advantage, the Commission could well tip the balance in the competition between privately-owned and publicly-owned electric utilities that has served the Nation well for the last century. Given Congress's intent to preserve the competitive balance in the electric power industry, it is inconceivable that Congress could have intended, with a fragment of one sentence in a massive legislative history, to hand the future of the electric power industry over to privately-owned utilities. Additionally, Southwestern Bell's claim that conferees were not "thinking about publicly owned utilities," Southwestern Bell's Comments at 14, is undercut by an author of the Conference Report, Congressman Dan Schaefer, who specifically noted in an August 5, 1996 letter to then Chairman Reed Hundt that utility means "any utility, regardless of the form of ownership or control," that "it is clear from the report language in the Conference Agreement that Congress recognized that utilities may play a major role in the development of facilities-based local telecommunications competition and that any prohibition on their provision of services should be preempted." See, Attachment I to Missouri Petition.


Finally, Southwestern Bell's argument is premised on the notion that some sort of "firewall" must exist between the public and private sectors in deploying telecommunications services. That is a false premise. As the Missouri Petition indicates, and as MCI's opening comments confirm, the public sector and private industry can work well together to achieve the goals of the Telecommunications Act – provided that they are not thwarted from doing so by measures such as HB 620.

In summary, Southwestern Bell's analysis of the legislative history is incomplete, incorrect and irresponsible.

IV. CONCLUSION

In many places across the nation, in states that have not adopted statutory, regulatory or other legal barriers to municipal telecommunications activities, municipalities and their electric utilities are installing broadband networks that are helping their communities prepare to survive and thrive in the 21st Century. They are wiring up schools and libraries, small businesses and residences, inner cities and rural areas, universities and hospitals, and libraries and government buildings. They are making high-speed telecommunications available to rural areas and high cost areas that would otherwise be left behind in the Information Age. The Commission should promptly preempt HB 620 in terms so clear and compelling that legislators, regulators, courts and other interested persons throughout the United States will know, once and for all, that state and local barriers to municipal involvement in telecommunications activities are contrary to the Law of the Land and that the Commission will act forcefully to eliminate them.

Respectfully submitted,



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August 28, 1998

CERTIFICATE OF SERVICE

I, Lana Meller, hereby certify that on this 28th day of August 1998, I caused copies of the foregoing Reply Comments of the American Public Power Association to be served on the parties on the attached Service List, by hand delivery, where indicated, and by first-class, U.S. Mail, where indicated.

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American Public Power Association

August 28, 1998

ATTACHMENT A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 97-1633 & 97-1634

CITY OF ABILENE, TEXAS, *ET AL.*,

PETITIONERS

V.

FEDERAL COMMUNICATIONS COMMISSION
AND
THE UNITED STATES OF AMERICA,

RESPONDENTS

ON PETITIONS FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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made it clear that judges are included." Ashcroft, 501 U.S. at 467 (emphasis in original).

The Court proceeded to find that the ADEA was ambiguous on this issue: "[W]e cannot conclude that the statute plainly covers appointed state judges. Therefore, it does not." Id.

Ashcroft requires this Court to apply the same analysis in this case. The Court's task here is not to search for a plain statement that municipalities are excluded from the term "entity" in section 253. Rather, in accordance with Ashcroft, the Court may not read the term "entity" in section 253 to cover municipalities unless Congress has clearly indicated that municipalities are included. As we have demonstrated, Congressional intent on this question is not "plain to anyone reading the Act." Ashcroft, 501 U.S. at 467. Therefore, the Court, like the Commission, should conclude that the term "entity" in section 253(a) does not include municipalities.

B. The Legislative History Of Section 253 Does Not Clearly Indicate That Congress Intended To Preempt The States' Authority To Limit The Activities Of Their Own Municipalities.

Petitioners complain that the Commission misapplied the Ashcroft standard by failing to consider the legislative history of section 253. According to petitioners, "that history makes it crystal clear ... that Congress intended to encourage municipalities" to help provide competition to telecommunications markets, "and that Congress manifested this intent through the definitions and preemption provisions of the Act." Pet. Br. 32. In the administrative proceeding, however, no party argued to the FCC that the legislative history of section 253 supported Abilene's preemption request. To the contrary, in comments filed with the Commission, Abilene urged the agency to ignore the legislative history: "The goal is to ascertain legislative intent through plain language of the statute without looking to legislative history or other extraneous resources." Abilene Reply Comments at 6 (JA) (emphasis

added). Thus, it is understandable why the FCC did not focus on legislative history when it ruled on Abilene's petition. Because no party asked the FCC to consider the legislative history in this context, and because Abilene itself urged the agency not to look at that history, petitioners cannot now claim that the legislative history justifies a remand in this case. See 47 U.S.C. § 405; Freeman Engineering Associates, Inc. v. FCC, 103 F.3d 169, 182-85 (D.C. Cir. 1997); Busse Broadcasting Corp. v. FCC, 87 F.3d 1456, 1460-62 (D.C. Cir. 1996).

Even if petitioners' legislative history argument were properly before this Court, it is baseless. As an initial matter, it is highly questionable whether legislative history should play any role in the application of Ashcroft's plain statement rule. Under that rule, a court must not construe a federal statute to preempt traditional State powers unless Congress has made "its intention to do so unmistakably clear in the language of the statute." Ashcroft, 501 U.S. at 460 (emphasis added) (quoting Will, 491 U.S. at 65). In this context, the Supreme Court has declared that Congressional intent to preempt "must be plain to anyone reading the Act." Ashcroft, 501 U.S. at 467. The Court's opinion in Ashcroft strongly suggests that if Congress does not make its preemption intentions plain in the text of a statute, the legislative history cannot supply the clarity that the statutory language lacks.

In any event, the legislative history cited by petitioners does not clarify whether Congress intended for section 253 to preempt State laws that regulate municipalities. See Pet. Br. 10-17. Most of the legislative materials quoted by petitioners focus on the provision of telecommunications service by utilities.⁸ These materials are not pertinent to this case. In the

⁸ See S. Rep. No. 367, 103d Cong., 2d Sess. 55 (1994) (1994 Senate bill, whose provision for removing entry barriers formed the basis for section 253, defined "telecommunications carrier" to include "an electric utility" that "provides telecommunications services"); Conference-Report at 127 ("explicit prohibitions on entry by a utility into telecommunications are preempted under" section 253); Letter from Congressman Dan Schaefer to FCC Chairman

Order challenged by petitioners, the Commission expressly declined to decide "whether section 253 bars the State of Texas from prohibiting the provision of telecommunications services by a municipally-owned electric utility." Order ¶ 179 (JA).⁹

Petitioners do not cite a single passage from the legislative history of the 1996 Act that discusses the provision of telecommunications service by municipalities. Instead, they rely principally on a 1994 Senate report on S. 1822, a bill whose provision for removing entry barriers formed the basis for section 253. Petitioners attach great significance to that report's statement that "State or local governments may sell or lease capacity" on their own telecommunications facilities to carriers providing telecommunications service. S. Rep. No. 367, 103d Cong., 2d Sess. 56 (1994). But that statement did not mean that the sponsors of the bill expected municipalities themselves to provide telecommunications service. To the contrary, the Senate report on S. 1822 emphasized that State or local governments that sell or

Reed Hundt, Aug. 5, 1996 (JA) (section 253 requires the Commission to "reject any state or local action that prohibits entry into the telecommunications business by any utility, regardless of the form of ownership or control"); Letter from Senator J. Robert Kerrey to FCC Chairman Reed Hundt, Sept. 9, 1997 (JA) (by using the term "any entity" in section 253, "Congress intended to give entities of all kinds, including publicly-owned utilities, the opportunity to enter these markets").

⁹ There is no basis for petitioners' assertion that the FCC should have given more weight to letters submitted by Representative Schaefer and Senator Kerrey during this proceeding. See Pet. Br. 15-17. Those letters asserted only that the term "entity" in section 253 includes municipally owned utilities; they took no position on whether the term encompasses municipalities themselves. Since the letters did not address the issue raised by Abilene's petition, there was no reason for the Commission to consider those letters when it ruled on that petition. In any event, the letters are merely "post-passage remarks" that "represent only the personal views of" two legislators. Regional Rail Reorganization Cases, 419 U.S. 102, 132 (1974) (internal quotations omitted). Such "post hoc observations by [individual] member[s] of Congress carry little if any weight." Bread Political Action Committee v. FEC, 455 U.S. 577, 582 n.3 (1982) (quoting Quern v. Mandley, 436 U.S. 725, 736 n.10 (1978)).

lease telecommunications capacity are not providing telecommunications service: "[T]he offering of [such] capacity alone is not a 'telecommunications service[.]'" Id.

In short, nothing in the legislative history cited by petitioners indicates that Congress even contemplated that municipalities themselves would provide telecommunications service. Obviously, if it is uncertain whether Congress considered this possibility, it is even less clear that Congress intended to preempt State laws that prohibit municipalities from providing telecommunications service.

In sum, neither the language nor the legislative history of section 253 clearly indicates that Congress intended to preempt the States' authority to prohibit their own municipalities from providing telecommunications service. In the absence of any plain statement that Congress authorized such preemption, the Commission properly applied the Ashcroft standard when it denied Abilene's request to preempt PURA95 section 3.251(d).

II. THE COMMISSION'S DENIAL OF ABILENE'S PREEMPTION REQUEST IS NOT INCONSISTENT WITH OTHER FCC DECISIONS.

In addition to asserting that the FCC misapplied the Ashcroft standard, petitioners claim that the Commission's denial of Abilene's petition is inconsistent with other FCC decisions. Pet. Br. 34-38. The second claim has no more merit than the first. The supposedly "inconsistent" decisions that petitioners cite are clearly distinguishable from the Commission's decision to deny Abilene's petition.

For example, the Commission's refusal to preempt PURA95 section 3.251(d) was not inconsistent with its previous preemption of the decisions of two Kansas municipalities to deny telephone franchise applications in Classic Telephone, Inc., 11 FCC Rcd 13082 (1996). The Commission's different resolution of these two cases was justified by the different factual

situation that each case presented. The cities that denied Classic's franchise applications concluded that the offering of telephone service in their communities by more than one company would be economically infeasible and inefficient. See Classic, 11 FCC Rcd at 13085 (¶ 6), 13089 (¶ 11). In effect, these cities imposed a flat ban on any entry by competing providers of local telephone service. That is precisely the kind of "barrier to entry" that section 253 was designed to preempt.

By contrast, the Texas statute challenged by Abilene "is not an outright ban on entry by competing local service providers." Order ¶ 188 (JA). Although PURA95 section 3.251(d) precludes municipalities and municipally owned utilities from providing telephone service in Texas, privately owned companies remain free to provide such service. The Texas law simply restricts the activities of the State's political subdivisions; it does not rest on any determination that competition in Texas would be economically infeasible and inefficient. The Commission reasonably determined that, the Texas statute notwithstanding, privately owned providers of telephone service could supply sufficient competition to satisfy the objectives of the 1996 Act: "Permitting the state of Texas to restrict participation in telecommunications markets by its municipalities thus does not thwart the Act's pro-competitive purposes to an extent that warrants preemption." Order ¶ 187 (JA).

There also is no conflict between the Commission's denial of Abilene's petition in this case and its decision in IT&E Overseas, Inc., 7 FCC Rcd 4023 (1992). Unlike Abilene's petition, IT&E Overseas did not implicate federal preemption of traditional State powers. Quite the contrary; in that case, Guam was attempting to exercise traditionally federal powers by asserting jurisdiction over interstate and foreign common carrier communications. To ensure that Guam did not usurp the FCC's exclusive authority to regulate those

communications, the Commission construed the term "any corporation" in the Communications Act to include public corporations such as Guam's publicly owned telephone company. IT&E Overseas, 7 FCC Rcd at 4025 (¶¶ 9-12). The Commission explained that this interpretation of the Act meshed with Congress's clearly expressed intent in 47 U.S.C. § 151 "to centralize authority over interstate and foreign communications in one federal agency." 7 FCC Rcd at 4025 (¶ 11) (emphasis in original). In order to carry out its function of regulating interstate and foreign communications in Guam, the Commission had to preempt Guam's attempts to regulate them. By contrast, in ruling on Abilene's petition, the Commission found no clear indication that Congress intended for section 253 to authorize FCC preemption of State laws governing municipalities. Therefore, in accordance with Ashcroft's plain statement rule, the Commission properly declined to construe the ambiguous term "entity" in section 253 to include municipalities.

Petitioners claim that the Order in this case is internally inconsistent because the FCC's denial of Abilene's petition somehow conflicts with other findings that the Commission made in the Order. Pet. Br. 36-37. No party presented that claim to the Commission, so petitioners cannot raise it here. See 47 U.S.C. § 405; Freeman Engineering, 103 F.3d at 182-85. In any event, the claim lacks merit. As petitioners point out, the FCC recognized that section 253 "obligates" the agency to "sweep away" both direct and indirect prohibitions on the provision of telecommunications service by any entity. Order ¶ 22 (JA). But, as we have already explained, the Commission found no clear indication that the term "entity" in section 253 included municipalities. Consequently, the Commission reasonably concluded that section 253 did not require FCC preemption of State laws forbidding municipalities from providing telecommunications services.

Petitioners also assert that because the Order preempted other provisions of PURA95, it likewise should have preempted PURA95 section 3.251(d). They note that the Order preempted certain build-out requirements and a moratorium on the provision of competitive service in specified rural areas. See Order ¶¶ 73-95, 101-108 (JA - , -). Preemption of these provisions, however, did not entail federal encroachment on traditional State authority to limit the activities of municipalities. The preemption requested by Abilene, on the other hand, would have required the Commission to infringe on Texas's authority to regulate its own municipalities. Petitioners complain that "the Commission applied a different standard" for municipalities. Pet. Br. 37. But they acknowledge that "a different standard" -- the Ashcroft standard -- should apply to Abilene's petition because Abilene requested preemption of a State's fundamental authority over its political subdivisions. The Commission correctly applied the Ashcroft standard when it declined to preempt PURA95 section 3.251(d).

Finally, petitioners maintain that the Order's interpretation of the phrase "any entity" in section 253 is inconsistent with subsequent FCC interpretations of the terms "any" and "entity." Pet. Br. 19-22, 37-38. Even if this were true, the Court has held that "the FCC is not bound retroactively by its subsequent decisions and need not explain alleged inconsistencies in the resolution of subsequent cases." Freeman Engineering, 103 F.3d at 179 (quoting CHM Broadcasting Ltd. Partnership v. FCC, 24 F.3d 1453, 1459 (D.C. Cir. 1994)). If there is an inconsistency between the Order and later FCC decisions, "it would appear more appropriate for the parties to these later cases to contest the inconsistency, than for [petitioners] to base [their] claim to inconsistency on subsequent opinions." Amor Family Broadcasting Group v. FCC, 918 F.2d 960, 962 (D.C. Cir. 1990). After all, "the Commission [can] hardly be faulted for ignoring 'precedents' that did not precede." Capital Network

System, Inc. v. FCC, 3 F.3d 1526, 1530 (D.C. Cir. 1993) (quoting Northampton Media Associates v. FCC, 941 F.2d 1214, 1217 (D.C. Cir. 1991)).

In any event, none of the subsequent FCC statements cited by petitioners address the fundamental issue in this case: whether Congress clearly intended for the term "entity" in section 253 to include municipalities. For that reason, petitioners cannot plausibly claim that the Commission's more recent statements are inconsistent with the Order.

CONCLUSION

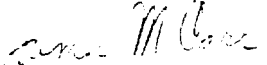
For the foregoing reasons, the Court should deny the petitions for review and affirm the Commission's denial of Abilene's petition for declaratory ruling.


Respectfully submitted,


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